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CASE NO. ——————

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN W. VICORY,

Petitioner,

vs.

ROBERT R. WALTON, Sheriff
of Butler County, Ohio, and
JOHN F. HOLCOMB, Prosecutor
of Butler County, Ohio,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. SMITH
1063 East Second Street
Post Office Box 369
Franklin, OH 45005
Telephone: (513) 746-2833
Counsel of Record for Petitioner

JAMES D. RUPPERT
LESLIE S. LANDEN
RUPPERT, BRONSON &
CHICARELLI CO., LPA
1063 East Second Street
Post Office Box 369
Franklin, OH 45005
Attorneys for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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QUESTIONS PRESENTED FOR REVIEW

1. Does the seizing of private property, not evidence in a criminal case, for a six month period, by a county sheriff upon the direction of the county prosecutor without compensation to the owner of such private property in violation of the Fifth Amendment to the United States Constitution as incorporated to the states by the Fourteenth Amendment of the United States Constitution, constitute a cognizable action under 42 U.S.C. § 1983.

2. Does *Parratt* v. *Taylor,* 451 U.S. 527 (1981) require the dismissal of a cause of action premised on the intentional seizure of private property by a county sheriff, upon the direction of the county prosecutor, which continues for a six month period, where no predeprivation process is provided and the owner of such private property is afforded a postdeprivation action for replevin or inverse condemnation.

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IN THE

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OCTOBER TERM, 1983

CASE NO. ————

JOHN W. VICORY,

Petitioner,

ROBERT R. WALTON, Sheriff
of Butler County, Ohio, and
JOHN F. HOLCOMB, Prosecutor
of Butler County, Ohio,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, per Chief Judge Carl B. Rubin, granting plaintiffs' motion for summary judgment, dated October 27, 1982, remains unreported to the knowledge of the petitioner. This opinion appears in the appendix to this petition. (App. 12a).

The November 30, 1983 opinion of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the District Court is reported at 721 F.2d

1062 (6th Cir. 1983). The order denying plaintiffs' petition for rehearing en banc remains unreported to petitioner's knowledge, and appears in the appendix to this petition. (App. 21a).

JURISDICTION

The judgment of the United States District Court for the Southern District of Ohio granting petitioner's motion for summary judgment was filed on October 27, 1982. The United States Court of Appeals for the Sixth Circuit reversed on November 30, 1983, and denied rehearing on March 28, 1984.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMEND. V, U. S. CONST.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMEND. XIV, U. S. CONST., § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts of the case were stipulated in the trial court. On or about October 1, 1979, three persons were murdered in a house trailer owned by the petitioner, John W. Vicory. The house trailer was located in Butler County, Ohio and was rented to a third party by Vicory to supplement his social security income. At no time was John Vicory a suspect in the triple homicide.

On October 2, 1979, the house trailer was seized under the direction of respondent, Robert R. Walton, Sheriff of Butler County, Ohio, at the request and instruction of respondent, John F. Holcomb, Prosecuting Attorney for Butler County, Ohio. No procedures were effected prior to this taking. The murder scene was investigated by the Sheriff's personnel. This investigation included the taking of blood and fabric samples and cutting sections from the walls and floor of the house trailer. This investigation, and the removal of evidence from the house trailer, was concluded within a few days of the seizure. No objection was made to this limited seizure. However, the respondents retained possession of the house trailer for the sole alleged purpose of preserving the scene for a jury view, which is not evidence under Ohio law.

The house trailer was returned to Vicory on March 24, 1980, nearly six months after its taking. This return was prompted by the entry of guilty pleas by the criminal defendant in the homicides and the lapse of his appeal time. During the deprivation of his house trailer, Vicory lost potential rents in the amount of eight hundred and fifty dollars ($850.00). No compensation has been paid to Vicory for the taking of the house trailer.

An action was filed in the United States District Court for the Southern District of Ohio on October 16, 1980, seeking relief under 42 U.S.C. § 1983, alleging the depriva-

tion of rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction in the federal courts was pursuant to 28 U.S.C. § 1343 (a) (3). Upon stipulated facts and the memorandum of all parties, the District Court granted summary judgment for Vicory against both respondents, holding that his property was taken without compensation and without the due process of law. The Court further held that respondent Walton failed to plead the affirmative defense of immunity, and, therefore, waived it, and that respondent, Holcomb, was not immune in the function being performed.

A three-member panel of the Sixth Circuit Court of Appeals reversed, holding that this intentional deprivation of property was only cognizable if Vicory pleaded and proved that state remedies for redress were inadequate. The majority relied solely on this Court's decision in *Parratt* v. *Taylor,* 451 U.S. 527 (1981) in reaching its conclusion. District Judge Bertelsman, sitting by designation, concurred, stating that while a deprivation of rights had occurred (both in taking without just compensation and in taking without due process of law), the immunity of the respondents would provide a full defense.

A timely petition for rehearing en banc was filed addressing the panel's failure to discuss the taking of Vicory's property without just compensation and challenging the interpretation given the *Parratt* decision. On March 28, 1984, an order denying the petition was filed. It was noted that a majority of the Court did not favor en banc consideration. Further, the order addressed the "taking without just compensation" issue and held that government officials acting individually cannot violate this provision of the Fifth Amendment.

The instant petition for writ of certiorari followed.

ARGUMENT

Rule 17 of this Court outlines the character of reasons considered in determining whether a writ of certiorari is appropriate in a given case. Some consideration includes: a) The existence of conflict between federal appellate courts on the issue presented, b) The decision of an important issue of federal law by a federal court of appeals which has not been, but should be, settled by this Court, and c) The decision of a federal question by a federal court of appeals in conflict with the applicable decisions of this Court. Each of these three reasons for review by this Court exists in the case at bar.

The Sixth Circuit ignored and misapplied the prior decisions of this Court regarding the viability of petitioner's civil rights claim. Additionally, the opinion of the lower court creates a conflict within the federal courts of appeal regarding the application of *Parratt* v. *Taylor,* 451 U.S. 527 (1981) to the intentional deprivation of property by state officials. It is essential that this Court clarify for the lower courts and the civil rights bar and litigants the issues presented herein. Further, review is necessary to insure justice in the case at bar.

I.

The initial issue on which review is sought is whether a taking of the private property of John Vicory by the sheriff, upon the request and instruction of the prosecutor, for a period of six months with no compensation to Vicory constitutes a cognizable action under 42 U.S.C. § 1983. The Sixth Circuit initially ignored both the allegations of the petitioner in this regard and the District Court's reliance on the "taking without just compensation" clause of the Fifth Amendment. See *Vicory* v. *Walton,* 721 F.2d 1062 (6th Cir. 1983). On rehearing, the Court addressed

this issue and concluded that the acts of the respondents herein did not give rise to an action under 42 U.S.C. § 1983. This interpretation conflicts with prior decisions of this Court and any logical analysis of the Bill of Rights.

This Court and the lower court have recognized the distinct nature of the right to receive just compensation for the taking of property, and the availability of a civil rights action when such compensation is not paid. See *Lake County Estates* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979); *Lenoir* v. *Porters Creek Watershed District,* 586 F.2d 1081 (6th Cir. 1978); *Gordon* v. *Warren,* 579 F.2d 386 (6th Cir. 1978).

In *Lake County Estates,* the petitioners owned property in the Lake Tahoe Basin. A complaint filed by these property-owners alleged that a land-use ordinace and general plan adopted by an agency, created by the cooperation between California and Nevada with the consent of Congress, had taken their property without just compensation and without due process of law. The District Court dismissed the complaint holding that since the agency had no power to condemn property, there could be no "taking". The individual members of the agency were held to be immune from suit. The Ninth Circuit Court of Appeals affirmed the dismissal of the agency, but reinstated the complaint against the individual defendants. In this Court, the defendants argued lack of jurisdiction because a private right of action does not exist for constitutional deprivation of property.[1] The Court stated that even if a *Bivens*-type cause did not exist, the allegations of the complaint fell within the parameters of 42 U.S.C. § 1983. Further,

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[1] The Ninth Circuit held that federal jurisdiction was based on an implied cause of action based on violation of the Fifth Amendment, comparable to the cause recognized in *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).

the Court held that the agency was not shielded from liability by the Eleventh Amendment, but that the individual members of the agency were entitled to absolute immunity because they acted in a capacity comparable to members of a state legislature.

The explicit language of the *Lake County Estates* Court recognizes the existence of a § 1983 remedy for a taking of property without just compensation. The Court further made it clear that § 1983 applied to the planning agency and its members despite the inability of the same to condemn property. The Sixth Circuit rejected these principles on the petition for rehearing below:

> The "taking" clause of the fifth amendment has commonly been viewed as a limitation on government. Here the plaintiff has sued not the government but two individuals for damages in connection with the detention of property. . . . Unlike a trespass or other property torts which may be committed by either an individual under or not under color of law or by a governmental entity, a "taking without just compensation" in violation of the fifth amendment is an act or wrong committed by a government body – a taking "for public use." (citations omitted) Plaintiff may not maintain a constitutional cause of action against these defendants who neither have or claim to have the eminent domain power, nor any power similar to it.
>
> Order Denying Petition for Rehearing En Banc at 2

The fallacy of the lower court's reasoning is obvious upon review of the language in the above-quoted portion of the order.

Petitioners agree that the "taking" provision of the fifth amendment, as applied to the states by the fourteenth amendment, see *Gideon* v. *Wainwright,* 372 U.S. 335

(1963) citing *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226 (1897), is generally viewed as a limitation on the power of government. Virtually every high school history student is aware that the Bill of Rights was added to the proposed Constitution to allay fears of oppressive government powers. In this manner, the "taking" cause operates no differently from the other provisions of the first ten amendments.

The Sixth Circuit asserts that the "taking" clause involves an act committed by government. Governments act through their officials. One of the fundamental premises of § 1983 is that government acts are accomplished by individuals, who may be liable for performing an official act which is repugnant to constitutional principles. See *Millikin* v. *Bradley,* 433 U.S. 267 (1977). Section 1983 liability is based on the fiction that while acting under the color of law, government officials are not within the scope of their employment, and thereby can be assessed money damages without violation of the eleventh amendment.

Therefore, the premise asserted by the court below is unsound. Prior decisions of that very court recognize the right to pursue a cause of action for a "taking without just compensation", pursuant to 42 U.S.C. § 1983, against individual government officials. See *Gordon* v. *Warren,* 579 F.2d 386 (6th Cir. 1978).

Finally, the lower court argued that the lack of condemnation authority makes this action untenable, relying on *Jacobson* v. *Tahoe Regional Planning Agency,* 474 F.Supp. 901 (D. Nev. 1979) *aff'd* 661 F.2d 940 (9th Cir. 1981) on remand from this Court. The *Jacobson* Court determined that no monetary damages were available to the plaintiff for several reasons. One reason was that a cause of action for inverse condemnation could not be stated against the planning agency and its members because

they lacked the power of condemnation. This Court did not comment on this ruling in the *Lake County Estates* decision, but did note the jurisdictional basis for the complaint for deprivation of fifth and fourteenth amendment rights under § 1983. Additionally, acts beyond the authority or power of a government official have frequently served as the basis for an action under § 1983. See *Monroe* v. *Pape,* 365 U.S. 167 (1961); *McKee* v. *Heggy,* 703 F.2d 479 (10th Cir. 1983). The assertion of the Sixth Circuit requires that a state official be acting in conformity with his power under the law to be liable under § 1983. This assertion is diametrically opposed to the proposition that many acts of state officials are not in conformity with law because they are unconstitutional. See *Florida Dept. of State* v. *Treasure Salvors,* 458 U.S. 670 (1982).

The entirety of the Sixth Circuit's analysis on this issue is flawed and repugnant to the principles and purposes of the fifth amendment and § 1983. The fifth amendment guarantees Americans that their property will not be taken without just compensation. Section 1983 provides a remedy where any person acting under color of state law deprives another of a right secured by the Constitution. The respondents are persons acting under the color of law. They took John Vicory's mobile home and no compensation was paid while the property was held for six months. Therefore, a § 1983 action is available in this case, and this Court should accept the instant case to reaffirm the validity of such an action and to correct the injustice done here.

II.

The court below interpreted *Parratt* v. *Taylor,* 451 U.S. 527 (1981) in a fairly broad manner, holding that the petitioner must plead and prove the inadequacy of state remedies before recovery for the intentional deprivation of property without due process of law is available under § 1983. This interpretation is at odds with the language of the *Parratt* Court as explained in *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982) and the Court's recent affirmance of *Vail* v. *Board of Education of Paris Union,* 706 F.2d 1435 (7th Cir. 1983) *aff'd* — U.S. —, 104 S. Ct. —, 80 L.Ed2d 377 (1984). Additionally, the decision below is in direct conflict with other federal court of appeals opinions addressing the same issue. See e.g. *Piatt* v. *MacDougall,* 723 F.2d 721 (9th Cir. 1984); *McCrae* v. *Hankins,* 720 F.2d 863 (5th Cir. 1983); *Keniston* v. *Roberts,* 717 F.2d 1295 (9th Cir. 1983); *McCoy* v. *Gordon,* 709 F.2d 1060 (5th Cir. 1983); *McKee* v. *Heggy,* 703 F.2d 479 (10th Cir. 1983); *Wilkerson* v. *Johnson,* 699 F.2d 325 (6th Cir. 1983); *Brewer* v. *Blackwell,* 692 F.2d 387 (5th Cir. 1982). These cases provide a sampling of decisions in disagreement with the application given *Parratt* by the court below. Finally, the *Parratt* decision has created substantial confusion within the federal courts, which requires clarification by this Court. See *Roman* v. *Richmond,* 570 F.Supp. 1554 (N.D. Calif. 1983); also *McCrae* v. *Hankins,* 720 F.2d 863, 869 n. 9 (5th Cir. 1983).

Parratt was decided on May 18, 1981. *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982) was decided within one year of that date. Justice Blackmun wrote for six members of the *Logan* Court and held that an Illinois statute which terminated employment discrimination claims not processed within one hundred and twenty days

was violative of the due process clause of the fourteenth amendment. Postdeprivation process, in the form of a tort action, was determined to be inadequate. In distinguishing *Parratt,* Justice Blackmun cites his concurring opinion in that case, in which he stated:

> More importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies", *ante,* at 538, within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property.
>
> 451 U.S. at 545-6 (Blackmun, J. concurring).

This portion of the *Logan* opinion suggests that the lower court here was in error in its interpretation of *Parratt.*

Further, the Court recently affirmed, without opinion, *Vail* v. *Board of Education of Paris Union,* 706 F.2d 1435 (7th Cir. 1983) *aff'd* —— U.S. ——, 104 S.Ct. ——, 80 L.Ed.2d 377 (1984) Jesse Vail was informed of an offer by the Board of Education of the Paris Union School District to leave his employment as supervisor of recreation and physical education at Stateville Correctional Center in Joliet, Illinois and accept a job with that school district as athletic director and football coach for a period of two years. After serving in those capacities for one year, Vail was terminated without any reason given. The trial court determined that Vail's constitutionally protected property interest in his continued employment was deprived him without due process, and therefore, granted judgment under § 1983. On appeal, the Seventh Circuit discussed extensively the existence of a protected property interest, and concluded that Vail had a legitimate expectation of continued employment and that his termination was a deprivation of his property without due process of law.

Circuit Judge Posner dissented, assailing the majority for distinguishing *Parratt* on "factitious grounds" 706 F.2d at 1455. Circuit Judge Wood stated that where state policies were ignored due to negligence or otherwise, *Parratt* was applicable, but not to this intentional deprivation. Circuit Judge Eschbach, concurring, stated flatly that *Parratt* "applies only to negligent deprivations of property." 706 F.2d at 1446. On April 24, 1984, this Court affirmed *Vail* by an evenly divided Court. — U.S. —, 104 S.Ct. —, 80 L.Ed.2d 377 (1984). This affirmance either closes the door on the application of Parratt to intentional deprivations of property, or leaves open that issue. It certainly does not endorse the application of *Parratt* to intentional deprivations. In either circumstance, the case at bar requires action by this Court.

Assuming the *Vail* case fails to answer the question, litigants face varied results on claims such as petitioner's due to the conflicting nature of the courts of appeals on this issue. Some jurists have viewed *Parratt* as a backhanded exhaustion requirement. See *Vail* v. *Board of Education of Paris Union,* 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J. dissenting); *Rutledge* v. *Arizona Board of Regents,* 606 F.2d 1345 (9th Cir. 1981) *aff'd on other grounds sub. nom. Kush* v. *Rutledge* — U.S. —, 103 S.Ct. 1483 (1983). Such a notion is clearly undercut by decisions of this Court, both prior to and after *Parratt.* See *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Patsy* v. *Florida Board of Regents,* 457 U.S. 496 (1982).

Three clear points of view have arisen in the various circuits: 1) *Parratt* applies only to negligent deprivation of property. See *Piatt* v. *MacDouglall,* 723 F.2d 721 (9th Cir. 1984); *McCrae* v. *Hankins,* 720 F.2d 863 (5th Cir. 1983); 2) Parratt may apply to intentional deprivations

but the burden is on the defendant to establish that a deprivation hearing is impractical or unduly burdensome. See *Keniston* v. *Roberts,* 717 F.2d 1295 (9th Cir. 1983); 3) *Parratt* applies to all deprivations of property and the burden is on the plaintiff to plead and prove the unavailability or inadequacy of state remedies. See *Vicory* v. *Walton* 721 F.2d 1062 (6th Cir. 1983)[2] These three approaches to the application of *Parratt* are incompatible. The result in the case at bar would certainly be different under the application of either of the other rules enunciated above than it was under the decision below. It is essential that this Court break the logjam so that the river of justice may flow freely again.

Other cases exist which accentuate the conflict between the varying interpretations of *Parratt.* In *McKee* v. *Heggy,* 703 F.2d 479 (10th Cir. 1983), the Oklahoma City police arrested William McKee and seized his car. After determining not to use the car as evidence, the police decided to treat the car as abandoned. Notice was given to the registered owners as listed in the Oklahoma Tax Commissioner's records. McKee had, however, asserted his ownership of the car and certificate of title in his name was in the glove box. No notice was provided to McKee. Summary judgment granted to the defendants in an action filed under § 1983. McKee appealed and the decision was reversed and remanded. The Tenth Circuit refused to apply *Parratt,* stating that "[s]ince it would have been

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[2] It is interesting to note that the author of the opinion below previously opined that *Parratt* was applicable only in prisoners' rights context, and that its application outside that context would be inconsistent with *Monroe* v. *Pape, supra* and *Patsy* v. *Florida Board of Regents, supra.* See *Wilkerson* v. *Johnson,* 699 F.2d 325 (6th Cir. 1983).

feasible to have provided Mr. McKee with notice before his car was sold, the availability of a state post deprivation remedy does not provide him with due process." 703 F.2d at 482 n. 6. The analysis applied by the *McKee* Court would also effect a different result in the instant case.

Another interesting case is *Wilkerson* v. *Johnson,* cited in footnote two of this petition. The *Wilkerson* case involved the denial of a barbershop license by the Tennessee Board of Bar Examiners. The Sixth Circuit affirmed a judgment for the applicants who were denied the license. Wilkerson and Sutton decided to open a barbershop next door to their beauty salon. Johnson, a member of the Board of Examiners who operated a barber shop next door, refused to license the plaintiff until they erected a wall between the shops and installed a second bathroom. Neither of these actions were required under state law. The applicants undertook to comply, but later failed to hook up the bathroom. A license for an apprentice barber was issued to Sutton, but a master barber must supervise all apprentice barbers. A master barber was no longer employed by Sutton and Wilkerson, and the Board issued cease and desist orders. Sutton attempted to take the examination to become a master barber, but was told by the Executive Secretary of the Board, she could not. Eventually Sutton took the exam and was licensed. The Board voted to bring charges for operating a shop without a master barber. The charges were dismissed within two months. The Board argued to the Sixth Circuit that a state procedure existed to remedy any abuse, and, therefore, that no due process violation occurred. Circuit Judge Merritt rejected this attempt to apply *Parratt* on two grounds:

1) Parratt was not an exhaustion requirement, and to apply it outside the prisoner's rights context would be inconsistent with *Monroe* and *Patsy;* and

2) The remedy available was only for the negligence of state officials not for malicious conduct.

The *Wilkerson* result is confounding in light of the opinion of Circuit Judge Merritt in the case below. It is apparent that confusion exists within the Sixth Circuit as to the parameters of *Parratt.*

These varying results and theories of application of *Parratt* serve no positive purpose in our judicial system.

> It is the current trend for defendants in civil rights litigation to urge that *Parratt* precludes any section 1983 action where the injury sustained can be redressed under state law. The Supreme Court has not yet spoken on the scope of the application of its decision in *Parratt,* and lower courts have reached varying conclusions as to *Parratt's* breadth. The Ninth Circuit currently has conflicting decisions on *Parratt's* application. (citations omitted).
>
> *Roman* v. *Richmond,* 570 F. Supp. 1554, 1555 (N.D. Calif. 1983)

This quotation emphasizes the confusion presently experienced by the lower courts and the civil rights bar. Only this Court can resolve this confusion.

The case at bar does not require a restatement of staid principles of law, but rather requires this Court to make clear the principles surrounding the viability of § 1983 claims where property is taken from a private citizen by government officials. For these compelling reasons, the

petition should be granted, and the Court should grant the issues herein in a full and complete review.

Respectfully submitted,

John D. Smith
Counsel of Record for Petitioner
James D. Ruppert
Leslie S. Landen
RUPPERT, BRONSON &
CHICARELLI CO., LPA
1063 East Second Street,
P.O. Box 369
Franklin, OH 45005
(513) 746-2833
Attorneys for Petitioners

APPENDIX A

OPINION OF THE COURT OF APPEALS DATED NOVEMBER 30, 1983

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-3828

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. VICORY,
Plaintiff-Appellee,

v.

ROBERT R. WALTON, Sheriff of Butler County; and JOHN R. HOLCOMB, Butler County Prosecutor,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed November 30, 1983

Before: MERRITT and KENNEDY, Circuit Judges; BERTELSMAN,* District Judge.

MERRITT, Circuit Judge, delivered the opinion of the Court in which KENNEDY, Circuit Judge, concurs. BERTELS-

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* The Honorable William O. Bertelsman, Judge of the United States District Court for the Eastern District of Kentucky, sitting by designation.

MAN, District Judge, (p. 9-11) filed a separate concurring opinion.

MERRITT, Circuit Judge. The primary question before us in this damage suit under 42 U.S.C. § 1983 (1976) for deprivation of property under color of state law without due process, is whether plaintiff must plead and prove the absence of adequate state damage remedies as an element of the constitutional tort. We conclude under the authority of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), that in section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the inadequacy of state processes, including state damage remedies to redress the claimed wrong. The plaintiff in this case has failed to carry this burden. The judgment of the court below awarding damages to plaintiff is therefore reversed.

I.

Defendants Robert R. Walton and John R. Holcomb, the sheriff and prosecutor of Butler County, Ohio, appeal an order of the District Court granting a summary judgment against them in a section 1983 action for damages resulting from an alleged violation of civil rights guaranteed by the fourth, fifth and fourteenth amendments to the Constitution.

Plaintiff John W. Vicory owns a mobile home trailer in Overpeck, Ohio. On October 1, 1979, three persons were shot in this trailer which had been rented from Vicory by one of the murder victims.

At the direction of prosecuting attorney Holcomb, and with the consent of plaintiff, Sheriff Walton seized the trailer on October 2, 1979, for the purpose of investigating

the triple homicide. The sheriff and prosecutor conducted an investigation at the trailer, which the coroner, Garrett J. Boone, had ordered sealed in order to preserve the scene for evidentiary purposes in case the trial judge, in his discretion, should order a view of it in the criminal trial.

After extended criminal proceedings against Richard E. Saylor, who entered pleas of not guilty and not guilty by reason of insanity to three counts of murder, the case was concluded on March 10, 1980, when the accused entered pleas of guilty to all three counts of the indictment. Two weeks later on March 24, 1980, Prosecutor Holcomb directed Sheriff Walton to return the trailer to Vicory's possession.

On October 16, 1980, Plaintiff Vicory commenced this section 1983 suit against Sheriff Walton, alleging that he had been deprived of his property, the trailer, under color of state law, without just compensation.[1] On May 25, 1982, plaintiff amended his complaint to add Prosecutor Holcomb as a defendant.

On October 27, 1982, the District Judge issued an order granting plaintiff's motion for summary judgment and awarding him a judgment for $850, the stipulated lost rental value of the trailer, plus reasonable attorneys' fees. The District Court held that the prosecutor was not entitled to absolute immunity, but only to a good faith immunity which on the facts of this case could not be invoked. Further, the court held that the retention of plaintiff's trailer

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[1] Although plaintiff's counsel stated before this Court in oral argument that plaintiff had made demand on defendants for return of the trailer soon after it was seized, we find no evidence in the record of a demand or any other formal effort made under state law to regain the property.

without compensation amounted to a violation of due process under the fifth amendment.[2]

II.

In *Parratt* v. *Taylor,* 451 U.S. 527 (1981), the Supreme Court held that the negligent deprivation of a prisoner's property does not violate due process if adequate state remedies are available to redress the wrong. *Parratt* held that in order to state a claim for relief in federal court under section 1983, a plaintiff must show that available state procedures were not adequate to compensate him for the deprivation of his property.

For the purposes of due process, retention of plaintiff Vicory's trailer in this case is analogous to the retention of the prisoner's hobby materials in *Parratt.* In both cases, a law enforcement official under color of state law has rightfully acquired, but perhaps wrongfully retained, the property of a citizen; and in both cases, state law provides immediate corrective process in its courts. In *Parratt,* Nebraska law provided the prisoner with a means to redress the loss of the hobby materials. *See* Neb. Rev. Stat. § 81-8.209 (1976). In this case, plaintiff can resort to an action in an Ohio court for forcible entry and detainer. *See* Ohio Rev. Code Ann. §§ 1923.01-.14 (Baldwin 1977). Moreover, the plaintiff is entitled to a jury trail under this statute. *See id.* § 1923.10. *See also Cuyahoga Metropolitan Housing Authority* v. *Jackson,* 67 Ohio St. 2d 129, 423 N.E.2d 177

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[2] The District Court made no direct reference to the sheriff's liability or immunity, perhaps because the sheriff did not raise the immunity issue as an affirmative defense. It must be presumed, however, that the District Judge intended the sheriff and the prosecutor to be jointly liable. Because we find that plaintiff has failed to show that he was denied the procedural due process § 1983 protects, it is unnecessary to reach the issue of the defendants' immunities.

(1981) (purpose of forcible entry and detainer statute is to provide summary, extraordinary and speedy method for recovery of possession of property). Although these state remedies may not provide the prisoner in *Parratt* or the plaintiff here with all the relief which might have been available if they could have proceeded under section 1983, the remedies could have fully compensated them for the property loss sustained, and are therefore sufficient to satisfy the requirements of due process.

There is a further significant similarity between this case and *Parratt*. The *Parratt* Court states that there is an important difference between a challenge to an established state procedure as lacking in due process — *see, e.g., Fuentes* v. *Shevin,* 407 U.S. 67 (1972) (invalidating Florida garnishment procedure requiring a hearing only after the repossession) — and a property damage claim arising out of the alleged misconduct of state officers. In the latter case, as here, "the state action is not necessarily complete," because state law provides a means for the plaintiff to be made whole for the loss of property. *See Parratt,* 451 U.S. at 542 (quoting with approval now-Justice Stevens' analysis in *Bonner* v. *Coughlin,* 517 F.2d 1311 (7th Cir. 1975), *modified en banc,* 545 F.2d 565 (1976), *cert. denied,* 435 U.S. 932 (1978)); *cf. Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982) (distinguishing *Parratt,* the Court held that availability of post-termination tort action does not supply due process when "[i]t is the state system itself that destroys a complainant's property interest" with an established state procedure).

Allowing the plaintiff in this case to invoke section 1983 in the absence of a showing that state remedies are deficient would "make of the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt,* 451 U.S. at

577 (*quoting Paul* v. *Davis,* 424 U.S. 693 (1976)). It is difficult indeed to perceive any logical stopping place to a line of reasoning that would almost necessarily result in turning every alleged property deprivation resulting from a criminal investigation or prosecution in which the property of citizens is retained by the state for evidentiary purposes into a section 1983 action.[3]

Plaintiff attempts to distinguish *Parratt* on the basis of intent. He argues that the conduct in refusing to return the property was intentional, rather than negligent, as in *Parratt.* Courts of Appeal are divided on whether the Supreme Court will extend the *Parratt* requirement of a showing of inadequate state remedies to cases involving the deprivation of liberty interests arising under the first and fourth through the eighth amendments or to intentional property deprivation. *See, e.g., Rutledge* v. *Arizona Board of Regents,* 660 F.2d 1345, 1352 (9th Cir. 1981) (holding that under *Parratt,* plaintiff must show that post-deprivation tort remedies available under Arizona law were deficient in order to state section 1983 claim for intentional assault and battery), *aff'd on other grounds sub nom. Kush* v. *Rutledge,* 103 S. Ct. 1483 (1983); *Palmer* v. *Hudson,*

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[3] The recent case of *Patsy* v. *Florida Board of Regents,* 457 U.S. 496 (1982), is not to the contrary. In that case, the plaintiff alleged that she had been deprived of employment opportunities at Florida International University solely on the basis of race and sex, in violation of § 1983. The Supreme Court held that exhaustion of state administrative remedies is not a prerequisite to an action under 42 U.S.C. § 1983. *Patsy* does not, however, stand for the general proposition that a person seeking to state a claim under § 1983 *for a deprivation of property without procedural due process* need not plead and prove that post-deprivation procedures and remedies available under state law were deficient. *Patsy* was concerned with the issue of exhaustion, not with what is necessary to state a procedural due process claim under § 1983.

697 F.2d 1220 (4th Cir. 1983) (*Parratt* applies to intentional deprivations of property but not to substantive violation of privacy rights), *cert. granted,* 51 U.S.L.W. 3919 (U.S. June 27, 1983) (No. 82-1630); *Vail* v. *Board of Education of Paris Union,* 706 F.2d 1435 (7th Cir. 1983) (section 1983 extends to protect property interest of employee with implied contract of employment, and since Supreme Court has refused to expand *Parratt* beyond "a tortious loss of property or result of a random and unauthorized act by a state employee," *Parratt* rationale does not require employee to allege inadequacy of state law remedies), *cert. granted,* 52 U.S.L.W. 3262 (U.S. Oct 3, 1983) (No. 83-87); Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983,* 9 HASTINGS CONST. L. Q. 545 (1982). *See also Ingraham* v. *Wright,* 430 U.S. 651 (1977) (no violation of procedural due process in school paddling case when plaintiff makes no showing that state remedies are inadequate).

As we read *Parratt,* the principal being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct or is based on strict liability. Nor does it matter whether the writ at common law would be in detinue (action for wrongful detention of a chattel by a bailor), trespass *de bonis asportatis* (action for carrying away plaintiff's chattels), trespass on the case (roughly speaking, an action for negligence) or a motion in a criminal case for return of property held as evidence. The reasoning of *Parratt* appears to extend at least to all section 1983 cases claiming a procedural due process injury to a property interest without regard to whether at common law a plaintiff would have sued in tort or contract and would have based his action on intent, negligence or strict liability.

Policy considerations do not require a federal hearing in

procedural due process cases that can be corrected in state court. So long as a state's damage remedies are not shown to be inadequate in theory or practice – that is, so long as there is no systemic problem with the state's corrective process – we see no purpose to be served by further complicating[4] section 1983 liability for damages in property cases by distinctions grounded in different types of intent, negligence and strict liability. After all, we are interpreting a general constitutional provision which forbids state deprivations of "property without due process of law," not the Internal Revenue or some other statutory code requiring fine property law distinctions.

Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong. In the instant case the plaintiff has

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[4] Section 1983 damage suits take up a large part of the time of the federal courts and have given birth to a confusing maze of complex rules since *Monroe* v. *Pape*, 365 U.S. 167 (1961), expanded liability to unauthorized acts of state officials twenty years ago. *See* Whiteman, *Constitutional Torts*, 79 MICH. L. REV. 5, 25 (1980) (noting that "every expansion of constitutional rights [through section 1983] will increase the case load of already overburdened federal courts," which "dilutes the ability of federal courts to defend our most significant rights" and "displaces state lawmaking authority by diverting decision-making to the federal courts").

neither alleged nor shown any significant deficiency in the state's remedies.

Accordingly, the judgment of the District Court is reversed.

BERTELSMAN, District Judge, concurring. Reluctantly, I find myself unable to endorse the majority opinion, both because I feel that the doctrine of prosecutorial immunity is a sufficient and more narrow basis on which to dispose of this case and because I respectfully disagree with the majority's conclusion that the doctrine of *Parratt* v. *Taylor,* 451 U.S. 527 (1981), is applicable to the facts herein. Also, I find myself in disagreement with the majority's analysis of *Parratt.*

The defendant prosecutor was clearly absolutely immune under the doctrine of *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), since all of his acts were well within the scope of his duties in prosecuting a criminal case. The defendant sheriff, having performed a ministerial function as directed by the prosecutor, shares in that immunity. *See Timson* v. *Wright,* 532 F.2d 552, 553 (6th Cir. 1976) and cases cited therein; *Denman* v. *Leedy,* 479 F.2d 1097, 1098 (6th Cir. 1973).

The fact that the sheriff failed to plead the affirmative defense of immunity is not fatal, since in a situation involving joint defenses one defendant can take advatage of the defenses asserted by his co-defendant. *See Willis* v. *Fournier,* 418 F.Supp. 265, 267 (M.D. Ga.), *aff'd,* 537 F.2d 1142 (5th Cir. 1976); *Capitol City Manor, Inc.* v. *Culberson,* 613 S.W. 2d 835, 837 (Ark. App. 1981); *Jackson* v. *District of Columbia,* 412 A.2d 948, 951 (D.C. 1980); *Haddad* v. *Louisville Gas & Electric Company,* 449 S.W. 2d 916, 919-920

(Ky. 1970); *Kooper* v. *King,* 15 Cal. Rptr. 848, 852 (Cal. App. 1961); 78 A.L.R. 938, 939.

Therefore, I would reverse with directions to enter judgment for both defendants on the basis of immunity alone.

I am constrained to conclude that *Parratt, supra,* is not applicable to the situation here presented. First of all, this case does not involve merely a denial of procedural due process, as stated by the majority, but also a denial of just compensation for the taking of private property for public use. There is abundant authority that such a cause of action is cognizable under § 1983. *Lake County Estates* v. *Tahoe Planning Agency,* 440 U.S. 391 (1979); *Lenoir* v. *Porters Creek Watershed District,* 586 F.2d 1081 (6th Cir. 1978); *Gordon* v. *Warren,* 579 F.2d 386 (6th Cir. 1978);

Secondly, the Supreme Court of the United States has expressly limited the scope of *Parratt* to cases involving a property loss resulting from a " 'random and unauthorized act by a state employee . . . not a result of some established state procedure.' 451 U.S. at 541." *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) (quoting from *Parratt*). The Supreme Court held in *Monroe* v. *Pape,* 365 U.S. 167 (1960) that the existence of an adequate state remedy was not a bar to the pursuit of a § 1983 action. *Parratt* narrowed this somewhat, but not to the extent held by the majority opinion herein. I agree with the view of the Seventh Circuit that, in the light of *Logan, Parratt* cannot be extended to cases involvng a loss of a property right as a result of intentional state action. *Vail* v. *Board of Education of Paris Union School District No. 95,* 706 F.2d 1435, 1440-1441 (7th Cir. 1983).

As I stated at the outset, it is with some reluctance that I find myself at odds with the majority concerning its interpretation of *Parratt.* I am in great sympathy with the desire of the majority to find some interpretation of § 1983

that will limit frivolous and *de minimis* actions brought under this statute, which in my opinion is employed in many situations never forseen or intended by its framers. The statute was primarily intended to provide redress to victims of racial animosity, where state remedies were inadequate either *de jure* or *de facto*. *See Monroe* v. *Pape, supra*. I do not believe that the statute was ever intended in the absence of invidious discrimination as a remedy for disgruntled teachers or other public employees or for losses of property through state action.

Where I have felt myself at liberty to do so within the limits imposed by *stare decisis*, I have tried to confine the statute to what I believe to be its proper limits. *See Reichert* v. *Draud*, 511 F.Supp. 679 (E.D.Ky. 1981), affd, 701 F.2d 1168 (6th Cir. 1983); *Stratford* v. *State-House, Inc.*, 542 F.Supp. 1008 (E.D. Ky. 1982), *aff'd*. No. 82-5519 (6th Cir. October 27, 1983) (unpublished).

Therefore, my reluctance is disagreeing with the majority results from my agreement with its goals. Would that the law were as it says. However, for the reasons set forth above, I do not believe that it is, nor that we are at liberty under controlling Supreme Court precedents to expand *Parratt* beyond losses of property due to unintentional acts. A narrowing of the scope of § 1983 to practicable limits may require a statutory amendment.

APPENDIX B

ORDER OF DISTRICT COURT GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DATED OCTOBER 27, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN W. VICORY, Plaintiff v. ROBERT R. WALTON, Sheriff, Defendant	C-1-80-552

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the cross Motions of the parties for Summary Judgment (Doc. 5, 17, 26 and 27) and upon a Stipulation of Facts and Legal Issues (Doc. 16).

It is agreed that on October 1, 1979, the plaintiff was the owner of a mobile home located at 2165 Jackson Road, Overpeck, Ohio. On that date, three homicides occurred in the mobile home, including that of the person who rented it from the plaintiff.

The parties agree that the mobile home was seized for the purpose of investigating the homicides on or about October 2, 1979 by the defendant, Robert Walton, Sheriff of Butler County, at the request of Butler County Prosecuting Attorney, defendant, John F. Holcombe [*sic*]. The parties stipulate that it is entirely proper for such premises to be sealed for a reasonable time for the purpose of con-

ducting investigation. It is further conceded by the parties that the premises were not used as evidence in any trial due to the plea of guilty of the responsible individual. The mobile home was returned to the plaintiff on or about March 21, 1980.

It is agreed that as a result of such seizure, the plaintiff lost rental from October 2, 1979 to March 21, 1980. The rental value is stipulated by the parties to be $850.00. (See Stipulation of Facts and Legal Issues, Doc. 16).

The liability of public officials in a matter such as this appears to be a question of first impression. Neither side has suggested specific authority on point and the Court has found none in its research.

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> ". . . nor shall private property be taken for public use without just compensation."

Mr. Vicory was denied the use of his property for approximately six months without compensation. The amount of damages involved in this case is relatively small. If the principle, however, which defendants assert is correct, the Prosecuting Attorney of any county, together with the Sheriff of that county, could impound any property, including the largest office building within their jurisdiction for such time as they saw fit. They assert in effect that the owner thereof is without relief. The broad powers of investigation by both the Prosecuting Attorney and Sheriff are just that, broad but not infinite.

The defendant Prosecuting Attorney of Butler County suggests that he is totally immune from suit on the authority of *Imbler* v. *Pachtman,* 424 U.S. 409 (1976). In no case

construing *Imbler* has it ever been suggested that the Prosecuting Attorney could deny an individual his property in violation of the Fifth Amendment. It has been pointed out by counsel that the Second, Third, Seventh and Ninth Circuits have all held that *Imbler* grants only good faith immunity, not an absolute immunity.[1]

This is intended to be a limited holding. The Court finds only that the retention of property in this case for a period of six months without compensation was unreasonable and a violation of the Fifth Amendment to the United States Constitution. The Court further finds that under the circumstances of this case, the Prosecuting Attorney of Butler County had only a good faith immunity, not an absolute immunity. In addition, the Court finds that the actions of the Prosecuting Attorney were unreasonable and beyond the limits of any good faith immunity.

Accordingly, Summary Judgment is hereby GRANTED to the plaintiff in the sum of $850.00 and for his costs herein expended.

This action was brought pursuant to 42 U.S.C. § 1983. Accordingly, plaintiff's counsel is entitled to a reasonable attorney fees and such award is hereby made.

This matter will be continued for a written presentation

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[1] *See Lee* v. *Willins*, 617 F.2d 320 (2nd Cir.) *cert. denied* 449 U.S. 961 (1980); *Forsythe* v. *Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979); *Hampton* v. *Hanrahan*, 600 F.2d 600 (7th Cir. 1979) *rev'd on other grounds*, 446 U.S. 754 and *Beard* v. *Udall*, 648 F.2d 1264 (9th Cir. 1981). The United States Court of Appeals for the Sixth Circuit has not considered this problem directly, but does agree that a Prosecuting Attorney may perform functions not "quasi-judicial in nature although within the scope of his authority." *Walker* v. *Callahan*, 542 F.2d 681 (6th Cir. 1976), *cert. den.* 430 U.S. 966 (1977).

by plaintiff's counsel pursuant to *Northcross* v. *The Board of Education of Memphis,* 611 F.2d 624 (6th Cir. 1979).

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin, Chief Judge
United States District Court

APPENDIX C

JUDGMENT OF DISTRICT COURT DATED OCTOBER 27, 1982

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-80-552

JOHN W. VICORY

vs.

ROBERT WALTON, Sheriff

JUDGMENT

This action came on for hearing before the court, United

States District Judge Carl B. Rubin presiding. The issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged that the plaintiff's Motion for Summary Judgment should be and is hereby GRANTED.

Plaintiff, is accordingly awarded the sum of Eight Hundred Fifty Dollars ($850.00) and for his costs herein expended. Plaintiff's counsel is entitled to reasonable attorney fees and such award is hereby made. Matter will be continued for written presentation regarding said attorney fees.

Dated at: Cincinnati, Ohio *Date*: Oct. 27th 1982

JOHN D. LYTER
Clerk of the Court

APPENDIX D

JUDGMENT OF DISTRICT COURT DATED NOVEMBER 10, 1982

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-80-552

JOHN W. VICORY

vs.

ROBERT WALTON, Sheriff

JUDGMENT

This action came on for hearing before the court, United States District Judge Carl B. Rubin presiding. The issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged the plaintiff's Motion for Summary Judgment should be and is hereby GRANTED. Plaintiff is accordingly awarded the sum of Eight Hundred Fifty Dollars ($850.00) and for his costs herein expended. Plaintiff's counsel is entitled to reasonable attorney fees and such award is hereby made. Matter

will be continued for written presentation regarding said attorney fees, nunc pro tunc as to October 27, 1982.

Dated at: Cincinnati, Ohio *Date*: Nov. 10-1982

JOHN D. LYTER
/s/ ANNE CATANZARO
Deputy
Clerk of the Court

APPENDIX E

JUDGMENT OF THE COURT OF APPEALS DATED NOVEMBER 30, 1983

United States Court of Appeals
FOR THE SIXTH CIRCUIT

No. 82-3828

[Filed November 30, 1983]

JOHN W. VICORY,
Plaintiff-Appellee,

v.

ROBERT R. WALTON, Sheriff of Butler County; and JOHN R. HOLCOMB, Butler County Prosecutor,
Defendants-Appellants.

Before: MERRITT and KENNEDY, Circuit Judges; and BERTELSMAN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of

the said District Court in this case be and the same is hereby reversed.

It is further ordered that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN,

Issued as Mandate: April 5, 1984

COSTS: None
Filing Fee.....$
Printing.....$
Total.....$

A true Copy.

Attest:

/s/ GEORGE McCARTHY
Deputy Clerk

APPENDIX F

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC DATED MARCH 28, 1984

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3828

JOHN W. VICORY,
Plaintiff-Appellee,

v.

ROBERT R. WALTON, Sheriff, et al.,
Defendants Appellants.

ORDER DENYING PETITION FOR REHEARING EN BANC

(Filed March 28, 1984)

Before: MERRITT and KENNEDY, Circuit Judges; BERTELSMAN,* District Judge.

In this case in which the District Court awarded $850 as damages for the lost rental value of a trailer seized for evidentiary purposes following a homicide, the plaintiff

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* The Honorable William O. Bertelsman, Judge of the United States District Court for the Eastern District of Kentucky, sitting by designation.

has moved for a rehearing en banc on the grounds that we mischaracterized his section 1983 claim as relating only to procedural due process rather than, as he now alleges, the prohibition contained in the fifth amendment against takings without just compensation. We note that plaintiff did not make this contention with any clarity or precision in his initial presentation of the case to this court. Notwithstanding this failure, we have fully considered the argument contained in plaintiff's en banc papers and are constrained to deny plaintiff's petition for rehearing en banc.

The "taking" clause of the fifth amendment has commonly been viewed as a limitation on government. Here the plaintiff has sued not the government but two individuals for damages in connection with the detention of property. It has not sued the state or a state agency for a taking "for public use."[1] Unlike a trespass or other property tort which may be committed by either an individual under or not under color of law or by a governmental entity, a "taking without just compensation" in violation of the fifth amendment is an act or wrong committed by a government body — a taking "for public use." See 2 P. NICHOLS, EMINENT DOMAIN § 6.21, at 6-44 (entity sued must have some authority, apparent or real, to exercise the power of eminent domain in order to commit taking). Plaintiff may not maintain a constitutional cause of action against these defendants who neither have nor claim the eminent domain power, nor any power similar to it. The wrongful "taking," detention or theft by an individual of the property of another is not a constitutional "taking"

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[1] The relevant clause of the amendment states: "Nor shall private property be taken for *public use*, without just compensation.'" (Emphasis added.)

as that term has been defined by the fifth amendment and commonly understood by the courts. *See Jacobson* v. *Tahoe Regional Planning Agency,* 474 F. Supp. 901 (D. Nev. 1979) on remand from the Supreme Court. The case holds that since defendant regional planning agency had no power of eminent domain, it could not be held liable for damages for a taking. The decision was affirmed at 661 F.2d 940 (9th Cir. 1981) (mem.). Plaintiff cites no case, and we can find none, that suggests that an individual may commit, and be liable in damages for, a "taking" under the fifth amendment.

For these reasons, and because a majority of the court has not voted in favor of consideration of the case en banc, the plaintiff's motion for a rehearing en banc is denied. Judge Bertelsman dissents from this order and would grant the petition.

ENTERED BY ORDER OF THE COURT

/s/ JOHN D. HEHMAN, Clerk

APPENDIX G

STIPULATION OF FACTS AND LEGAL ISSUES IN THE DISTRICT COURT FILED SEPTEMBER 16, 1981

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-1-80-552

JOHN W. VICORY,

Plaintiff,

v.

ROBERT R. WALTON, SHERIFF

Defendant.

STIPULATION OF FACTS AND LEGAL ISSUES

(Filed September 16, 1981)

It appearing to the parties from the Complaint, Answer, and Answers to Interrogatories, that there are certain undisputed facts in the case at bar, the parties hereby consent and agree to stipulate the following facts and legal issues to the Court for its determination of this matter upon a Motion for Summary Judgment. The following facts are undisputed between the parties:

1. The jurisdiction of this Court has been properly

invoked under the applicable United States Code Sections and Amendments to the Unted States Constitution as is alleged in the Plaintiff's Complaint.

2. The parties stipulate that the Plaintiff owns a mobile home/trailer at 2165 Jackson Road, Overpeck, Ohio, and that on October 1, 1979, the shooting deaths of three persons occurred in that premises which was rented at that time by one of the said persons shot to death in said premises.

3. The parties stipulate that said trailer was seized for the purposes of investigating the above mentioned homicides on or about October 2, 1979, at the direction of the defendant, Robert Walton, Sheriff, and the request of the Butler County Prosecutor, John F. Holcomb.

4. The parties stipulate that on the above mentioned date and for a reasonable time thereafter, the State of Ohio, through its agents, the defendant, Robert R. Walton, Sheriff, and John F. Holcomb, Butler County Prosecutor, conducted an investigation of the above mentioned crimes pursuant to the State's authority to conduct an investigation of all criminal activity. The parties further stipulate that said seizure of the plaintiff's trailer for the purpose of conducting said investigation is a proper exercise of authority of the State and is lawful.

5. The parties stipulate that after said reasonable investigation was concluded, the defendant, Robert R. Walton, Sheriff, continued to retain possession of the plaintiff's property at his own direction, the direction of the Butler County Coroner, Garrett Boone and at the request of the Butler County Prosecutor, John F. Holcomb, for the purposes of retaining said trailer and to maintain it in the condition found for use at trial of the person charged with the above mentioned homicides.

From the above undisputed facts stipulated hereto by the parties, the parties further stipulate that the legal issue in this case can be stipulated to the Court for Decision on a Motion for Summary Judgment as follows:

1. Whether the Defendant, Robert R. Walton, Sheriff of Butler County, Butler County Coroner, and John F. Holcomb, Butler County Prosecutor, may through the exercise of their authority and/or powers as is granted to them by virtue of their public offices, and by state law, may retain the property of the plaintiff on the basis that there is such authority to maintain the premises in the condition found for use at trial of a person charged for said homicides.

2. It is not disputed between the parties that the State of Ohio through its agents, may seize the property of plaintiff to conduct the initial investigation and retain said property for a reasonable time to conduct the same. The issue as framed above is only as to whether said defendant may retain said property for the purposes elicited above.

DAMAGES:

The parties hereby stipulate that the compensatory damages for the lost rental value of plaintiff's trailer in this matter is no more than $850.00.

. . . . . .
JUDGE, UNITED STATES
DISTRICT COURT

/s/ JOHN D. SMITH
Attorney for Plaintiff, John Vicory

/s/ MICHAEL T. GMOSER
ASSISTANT PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO
Attorney for Defendant, Robert R. Walton, Sheriff